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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1321

NICHOLAS PALUMBO, FRANK CHIODA and EUGENE SHINE,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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October Term 1977

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No.

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NICHOLAS PALUMBO, FRANK CHIODA and EUGENE SHINE,

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-against-

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioners, NICHOLAS PALUMBO, FRANK CHIODA and EUGENE SHINE, respectfully pray that this Court issue a writ of certiorari to review the Judgment and Order of the United States Court of Appeals for the Third Circuit, rendered on January 9, 1978, which affirmed petitioners' conviction for conspiracy to distribute a narcotic, percodan, in violation of 21 United States

Code, Sections 841, 846, 1308.12 and 1308.13.

Petitioners were convicted after a jury trial in the United States District Court for the District of New Jersey, at Trenton, New Jersey. They were acquitted of four counts of possession and distribution of narcotics.

On July 5, 1977, Hon. Clarkson F. Fisher sentenced NICHOLAS PALUMBO to fifteen years in prison, FRANK CHIODA to twelve years and EUGENE SHINE to nine years. Except for SHINE, the petitioners had almost no criminal record. All three men were remanded after the jury finding and they remained incarcerated except for SHINE, who was released on bail pending appeal by the Court of Appeals.

JURISDICTION

The jurisdiction of the Court is invoked under Title 28 U.S.C., Section 1251. No opinion was written by the Court of Appeals.

QUESTIONS PRESENTED

1. Whether the classification of percodan as a Schedule II narcotic, and petitioners' conviction thereunder, constituted an erroneous and unreasonable classification so as to deprive them of due process and

equal protection of the law.

2. Whether the absence of any proof whatsoever that petitioners knew percodan was a Schedule II narcotic, even assuming that it was, operated to deprive them of due process of law.

3. Whether independent evidence linking a defendant to a conspiracy other than the statement of a co-conspirator should be required as an essential element of the fair trial process.

4. Whether the post-arrest conversation in which one petitioner engaged could be used against the other petitioners, and whether it violated Bruton v. United States.

5. Whether the cumulative errors of the Court, including denigrating comments directed at counsel, deprived petitioners of a fair trial.

6. Whether the attorneys had the power to waive petitioners' right to a trial by jury on one of the elements to be proven by the government.

STATUTES

21 U.S.C. Section 841 Prohibited acts A-Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or

possess with intent to manufacture, distribute, or dispense, a controlled substance . . .

Penalties

(b) Except as otherwise provided in Section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in Schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000., or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000., or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

21 U.S.C. Section 846 Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. Section 1308.12 Schedule II

(a) Schedule II shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section. Each drug or substance has been assigned the Controlled Substances Code Number

set forth opposite it.

(b) Substances, vegetable original or chemical synthesis. Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, excluding naloxone and its salts, and excluding naltrexone and its salts, but including the following:

1. Raw opium	9600
2. Opium extracts	9610
3. Opium fluid extracts	9620
4. Powdered opium	9639
5. Granulated opium	9640
6. Tincture of opium	9630
7. Apomorphine	9030
8. Codeine	9050
9. Ethylmorphine	9190
10. Etorphine hydrochloride	9059
11. Hydrocodone	9193
12. Hydromorphone	9150
13. Metopon	9260
14. Morphine	9300
15. Oxycodone	9143
16. Oxymorphone	9652
17. Thebaine	9333

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph (b)(1) of this section, except that these substances shall not include the isoquinoline alkaloids of opium ...

21 U.S.C. Section 1308.13 Schedule III

...(e) Narcotic drugs. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium 9803

(2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts 9804

(3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium 9805

(4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active non-narcotic ingredients in recognized therapeutic amounts 9806

(5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters per dosage unit, with one or more active non-narcotic ingredients in recognized therapeutic amounts 9807

(6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts 9808

(7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams or not more than 25 milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts ... 9809

(1) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams, with one or more active, non-narcotic ingredients in recognized therapeutic amounts 9810

FACTS

This indictment charged the three petitioners with one count of conspiracy and four counts of distribution of a Schedule II narcotic drug controlled substance, to wit: percodan. Percodan is not named as such in either Schedule II or III, but the government contended that the oxycodone designation within Schedule II was synonymous with percodan. This was one of the main issues on this appeal which the Court below in part decided based on petitioners' counsel's failure to move to dismiss prior to trial. However, it should be stated that it was the position of the petitioners that percodan and oxycodone were not similar things, and for the other reasons set forth hereinafter, the indictment was defective. It is also contended that the government didnot prove that percodan was a Schedule II narcotic and that, in truth, if it is controlled at all, it comes within Schedule III. Hence, as the government conceded at the trial, this indictment would be defective on its

fact. The Court of Appeals, in oral argument, commented that petitioners' attorneys had consented to the Court's deciding that issue rather than the jury, so that the petitioners had little left to argue. Of course, that raises the question of whether counsel waived their clients' right to a jury trial on that issue and, if so, whether it could be effective without their clients' consent.

The petitioners owned a corporation known as Eastern Chemical Co., Inc., located in the State of New Jersey, which basically dealt in industrial and other chemicals in general.

The first witness was a man from Endo Laboratories, a security officer, who was introduced for the purpose of showing that the pills in question originally came from a shipment made by Endo Laboratories. These pills were the subject of a theft, but the government's position was that it was not in any way contended that the petitioners had anything to do with that wrongful taking.

One of the main witnesses in this case was RICHARD CICCONE, an eighteen year old who purchased the percodan pills from one, ROBERT CRITELLI, and thereafter sold them to undercover police. Significant'v,

CICCONE did not know any of the petitioners (21A)*, and his testimony basically related to how he obtained the percodan from his brother, TONY, after scratching out the lot numbers so it could not be traced (22A). Thereafter, on October 28, 1976, he met a friend of KENNY's who was introduced to him as DOMINICK, but who in reality was the undercover police officer who ultimately made the percodan buys. DOMINICK also did not know the petitioners and had no dealings with them.

At any rate, CICCONE detailed meeting DOMINICK in the presence of his brother and selling him twenty bottles of percodan for approximately $1,100.00 (1.76-78)**. There was a subsequent meeting on November 1, 1976, in Edison, New Jersey, when the purchase of two hundred bottles was discussed (1.80), and the witness described the various transactions and discussions regarding the purchase of percodan that he had with the undercover police officer. None of this testimony in any way involved any of the petitioners. ROBERT CRITELLI, who was his brother's partner, was apparently the source of the percodan and he relied

*"A" references are to pages of the appendix.
**Numerical references are to pages of Stenographer's Minutes.

upon CRITELLI for essentially all of the decisions that had to be made with respect to the sale of this substance (1.85-90). They were negotiating to sell another two thousand bottles to the police officer, and on November 16th, when the transaction was supposed to finally be made,he was arrested (1.96).

The next witness, WILLIAM T. FRANK, an employee of Bell Telephone in New Jersey, identified various toll records kept by the company and they were received in evidence (2.193-201). These records related to telephone calls made from telephones of Eastern Chemical and other locations wherein conversations, according to ROBERT CRITELLI, were had pertaining to the sale of percodan.

ANTHONY CICCONE, JR., the older brother of RICHARD CICCONE, was the next government witness. He knew CRITELLI because they were partners in an automobile body business which broke up in March, 1976. They were both in debt, and on October 19, 1976, CRITELLI called to say that he had something to show him (2.203). CRITELLI brought a bottle of percodan with him and asked him whether he could sell it. That began the transactions between the two men with respect to the sale of various bottles

of percodan (2.214). CICCONE really did not know what the pills were, but CRITELLI described them as "downers" similar to tuinal (2.215). CICCONE said that he had no knowledge where CRITELLI got the percodan, except that CRITELLI said he could get a lot of it (25A). On October 23, 1976, he was with CRITELLI at Eastern Chemical. CRITELLI called him and told him to take a ride with him, that they were going to pick up two cases of percodan. The witness described the physical lay-out of Eastern Chemical and testified that both PALUMBO and CHIODA were both in the office that day (27A). He said that CRITELLI spoke to CHIODA while PALUMBO was sitting saying nothing (28A-29A). CHIODA was arguing with CRITELLI because CRITELLI only had $640.00 for one case and he didn't want to give any of the cases on consignment. CRITELLI was trying to convince CHIODA otherwise and assured him that payment would be made (29A). CHIODA wasn't happy, but he finally agreed, and then PALUMBO went over to the entrance to the garage, entered, and came out with two cases of percodan which were placed in CRITELLI's car (30A). The $640.00 was given to CHIODA and the two men left. The witness then described attempts to sell the percodan. His testimony was similar to that of his

brother, in which he told of discussions for the sale of two thousand bottles of percodan. On the occasion when the deal was supposed to close, the arrests were made. He again reiterated that during the conversation between CRITELLI and CHIODA, PALUMBO did not participate at all (31A-36A). The witness also said that during the time he was at Eastern Chemical he never saw EUGENE SHINE (38A).

The main witness in this case, and the only one to implicate the petitioners, was ROBERT L. CRITELLI (4.26), no stranger to dealing in drugs or a life of crime in general. He was thirty-four years old, divorced and had known CHIODA for about eighteen years and PALUMBO for about ten years (4.27-28). He identified the telephone toll exhibits and basically used these sheets as a guide to refer to when he testified. In fact, later on, on cross examination, when the sheets were taken away from him, he could not recall anything of any substance and couldn't even recall the telephone conversation that he had previously testified to, or other conversations or calls that were reflected on the sheets. The significant telephone calls were circled in pencil and the distinct possibility that these conversations were based on testimony of a totally rehearsed witness

must be considered.

He said that PALUMBO and CHIODA were partners in Eastern Chemical, a company that dealt in and sold industrial chemicals. He made a telephone call to Eastern on October 4, 1976 at 3:39 in the afternoon, and he stated that FRANK CHIODA asked him to stop over to see him about something important (39A). He described the physical lay-out of the premises and saw both petitioners, PALUMBO and CHIODA (40A-42A). After they exchanged greetings, CHIODA apparently removed a small bottle from the top drawer of his desk and threw it to CRITELLI. CRITELLI asked what it was and CHIODA told him that it was a bottle of percodan pills. The witness professed not to know what percodan was and CHIODA told him it was a depressant, and asked the witness whether he could sell it. CRITELLI told him that he didn't know, but would try. CHIODA told him that they had about fifteen or sixteen cartons and that the price was still undecided. CRITELLI said he would speak to someone and he left. The witness said that PALUMBO was just sitting there during the conversation and did not participate in it at all (43A-44A).

CRITELLI then talked about his efforts to sell the pills and the related conversations that he said took place, wherein he repeatedly reported to PALUMBO or CHIODA his progress in trying to dispose of the percodan. He said that on October 8, 1976, he again met with both petitioners at Eastern Chemical and CHIODA asked if he was making any progress in selling the percodan. He also said that on both occasions he saw SHINE there but SHINE wasn't doing anything in particular (48A). However, during the conversation regarding percodan, CHIODA passed a remark to the effect, "You mean, MONK finally did something right?" and PALUMBO answered, "Yes, finally." (49A). SHINE was also known as MONK, but he apparently was not present when this statement was made. On October 19, 1976, CRITELLI called CHIODA to tell him the two cartons were sold and he was going to turn the money over (50A). CRITELLI went again to Eastern Chemical and saw PALUMBO and CHIODA in their office (50A). CRITELLI allegedly told them about his deals with the CICCONE's and again PALUMBO did not participate in the conversation (51A). CRITELLI handed over the $1,240.00 which CHIODA counted on the desk in front of him (52A). This, too, is uncorroborated testimony.

On October 23rd, he said that he spoke to PALUMBO and ordered a case of pills for CICCONE. PALUMBO told him to come over, so he pkcked up CICCONE, obtained $640.00, and they drove to Jersey City to meet PALUMBO. They also saw CHIODA there, and during the conversation, he introduced TONY CICCONE to the appellants (54A). CRITELLI allegedly said that TONY ordered two cases of pills, one of which he paid for and one for which he owed. After that was agreed to, PALUMBO got the two cases and gave them to CICCONE. CICCONE did all the talking and the only thing PALUMBO said was that CRITELLI should keep them informed (55A). (This contradicted CICCONE's testimony, who said that PALUMBO did not say anything.) CRITELLI spoke to CHIODA about buying more pills on October 25th, and he went over to Eastern after work to pick up some more cartons (56A-57A). He met with both petitioners, and they told him to go outside, that MONK, meaning SHINE, would put them in his car (57A). He went outside, backed his car up to the premises and opened the trunk. SHINE put a large package wrapped in a heavy gauge trash can liner in the trunk of the car and the witness then left (58A). There is no evidence that SHINE knew what was in the package, and that apparently is SHINE's total role in this

alleged conspiracy.

Thereafter, the witness said he called PALUMBO and CHIODA to inquire as to where to meet to pay for more pills that he was going to get to consummate the transaction he said he had already completed (4.94). He spoke to CHIODA, and a meeting was set up for 10:00 P.M. at a particular bar on Route 1 in Edison. CRITELLI was at the bar when ANTHONY CICCONE arrived and told him everything was okay, but the buyers only wanted one hundred bottles rather than six cases (4.98). CICCONE also at this time paid CRITELLI $2,150.00 for one hundred bottles he had already sold (4.99). CRITELLI said that at this particular time he told ANTHONY CICCONE the identity of the people who were supplying him with the pills (4.99-100). However, the testimony of ANTHONY CICCONE and his brother did not support that statement, since they said that they had never been told who the suppliers were (23A-24A). He related another conversation with CHIODA, wherein CHIODA told him there were between six and one-half and seven cartons left for sale (59A). CRITELLI wanted to pick them up that evening, but CHIODA said he wouldn't be there, he should call back and talk to NICK PALUMBO (59A). The witness did that, and they agreed to meet at a bar near

the place of business. It was agreed that SHINE would meet CRITELLI at 6:45 P.M. (60A). He went to the bar but SHINE wasn't there. He went to Eastern Chemical, but it was closed, so he called PALUMBO at home to find out what happened (61A). PALUMBO said that SHINE was at the bar and CRITELLI was instructed to go back and wait (62A). SHINE supposedly took CRITELLI's car and returned it two minutes later with the additional pills in the trunk (62A). The witness then went to the Raritan Center in Edison, put the pills in the woods and called ANTHONY CICCONE at his mother's house. Later, CICCONE met him and they retrieved the pills from his mother's house in order to deliver them to the undercover police officer (5.22-23). About half an hour later, at the Ramada Inn, everyone was arrested (5.24). He decided to cooperate immediately in order to obtain the release of his girlfriend who had also been arrested, and no promises were made to him at this time (5.25).

On December 10th, in response to a call from CHIODA, he went to Eastern Chemical in the company of Detective WAINEN, where he met CHIODA. PALUMBO was not present (65A-69A). CRITELLI said he didn't know what to do, he had a choice whether to plead guilty to conspiracy or fight the case, but he didn't have money for lawyers

(69A). CHIODA told him that the choice was his, but he should have plenty of money within the next week or so, and then they discussed what ANTHONY was going to do about defending his case, and CRITELLI made a statement to the effect that CHIODA should not forget that ANTHONY was there once to pick up a case of pills. CHIODA's response was, "Yes, I remember him being here." (71A).

The witness admitted that he had a 1967 conviction for forging a signature on a bill of sale to a truck and that he had two pending cases involving uttering a forged instrument, possession of stolen property and possession of burglary tools (5.82-83). However, he reiterated that he had not been given any specific promise with regard to his plea.

On cross examination, he admitted that on the telephone records certain circles appeared around various telephone numbers. The circles were made by the agents (5.97-98). When the attorney picked out random telephone calls from the various telephone record sheets, the witness was unable to remember anything (5.97-105). It was clearly demonstrated that without these sheets in front of him and without the circled telephone numbers to guide him, the witness

could really remember very little (72A-73A).

The undercover police officer, known as DOMINICK, but whose real identity was ROBERT WAINEN, was the next witness. He testified as to all of the narcotic dealings he had with the CICCONE's and CRITELLI. He basically reiterated their testimony which had nothing to do with the petitioners. In fact, on cross examination, he said that he had never met PALUMBO until he was arrested (89A). He had no personal knowledge that CHIODA distributed any percodan (90A), and none of the names of any of the three petitioners were ever mentioned to him until after the arrests (91A,92A-94A).

The witness indicated that CRITELLI was no babe in the woods when it came to dealing in stolen property (95A), and, in fact, the sellers were very concerned about removing the serial numbers from the percodan bottles so that the pills could not be traced. It is interesting that the petitioners, who were supposedly experts in the chemical business, had not removed these serial numbers. It would seem that they either did not know what the cases contained or they had no knowledge that selling percodan could be claimed to be in violation of the law.

WAINEN also related the incident on December 10,

1976, long after the arrests had been made, when he went to the premises of Eastern Chemical with CRITELLI. His testimony was essentially the same as CRITELLI's. He met CHIODA. PALUMBO was not there, and he related the conversation that ensued (79A-88A). No percodan was ever found on the premises of Eastern Chemical (97A). When he went there that day, CHIODA had no objection to him coming into the office and listening to the conversation (98A). One wonders whether this behavior of CHIODA was the act of a man who knowingly had committed a crime or tried to cover his tracks.

JEFFREY WEBER, was a forensic chemist employed by the D.E.A. (7.119). He testified that he analyzes substances suspected of being narcotics, had been employed there for seven years and had degrees in chemistry from City College and Brooklyn College (7.119). He testified that he had analyzed drugs on thousands of occasions and had been an expert in Court many times (7.120). However, if one understands a little bit about the background of percodan, there can be no doubt that this chemist had absolutely no knowledge with regard to the nature and characteristics of that substance and that his testimony should have been ruled incompetent as a matter of law. It is suggested that a half hour's

research would make one more of an expert on percodan than Mr. WEBER. It was incumbent upon the government, a fact recognized by everyone, to prove that percodan was a Schedule II narcotic and this witness' testimony was the only testimony regarding that issue. The whole thing was so contradictory and so confusing that it could not reasonably be argued that he proved anything. Mr. WEBER described the tests he made and concluded that the government's exhibits in this case, the pills, were a preparation made by Endo Laboratories known as percodan which contained oxycodone (99A-101A).

Over objection, which will be discussed in the argument portion of this petition, the Court took jusicial notice that oxycodone was a Schedule II substance, and the witness testified that to the best of his knowledge, oxycodone was controlled under Schedule II (101A-102A). That concluded the witness' direct examination, and on cross examination, WEBER testified that the oxycodone component in percodan was 4.50 milligrams of 14-hydroxydihydrocodeinone, that substantially differed from oxycodone in that it had hydrochloride attached to the molecule which resulted in that compound (105A). He was then asked what the difference was between that substance and dihydro-

codeinone, but the witness didn't know, saying he would have to look at his Merck Index. He thought, however, that they were identical (107A). The chemist then looked at Schedule III,which included components containing not more than 300 milligrams of hydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit (108A). Obviously, if the hydrocodeinone is the same as a substance found in percodan, then it fits in with the Schedule III classification and cannot be considered a Schedule II narcotic, since by the very terms of Schedule II, if the substance is dealt with elsewhere, it is excluded from classification under Schedule II. The witness had no knowledge as to whether oxycodone and dihydrocodeinone are the same, but he thought that they were (109A). The chemist also acknowledge that the oxycodone component in percodan only amounted to 4.5 milligrams, which means that the milligrams in the usual dosage of a percodan pill was less than the 15 milligram per dosage unit described in Schedule III (110A). The attorneys argued that this is a Schedule III narcotic, but the Court would not allow anything further, and held that a percodan tablet, no matter what was in it, came under Schedule II. The witness constantly reiterated

the fact that he really did not know the difference between these various chemicals, and the chemist said that he could not even say with certainty that the substance in this case was really a Schedule II narcotic. The witness also referred to the literature put out by Endo which showed that the oxycodone compound was 14-hydroxydihydrocodeinone. It was shown that percodan is made up of other materials as well.

The next day the government put Mr. WEBER back on the witness stand. The prosecution conceded that the question of whether percodan was a Schedule II narcotic was an essential element of the indictment and must be proven by the government beyond a reasonable doubt (119A). Argument was also made that the question of whether the material was a controlled substance was a question of law and not one of fact, an argument which the Court agreed with, so that the issue of whether percodan was oxycodone was never submitted to the jury, but decided bythe Court (121A). The petitioners' attorneys consented to the issue being decided by the Court. In effect, petitioners' right to a jury trial on the issue was waived. The question arises as to whether counsel could take this

action without the actual consent of the petitioners. The government also admitted that if the substance was really a Schedule III drug, then the indictment would have to be dismissed (122A). WEBER testified that he looked at his Merck Index, and after reading from page 774 of that volume he concluded that oxycodone and dihydrocodeinone, the substance described in Schedule III, are different (123A-124A). He claimed that oxycodone, as mentioned in Schedule II was different than dihydorcodeinone, as discussed in Schedule III. It is also interesting to note that regardless of what the outcome of that argument may be, the question of whether the petitioners would have had to know that it was a Schedule II rather than a Schedule III narcotic arises, and there was absolutely no proof in this case that petitioners had that knowledge. Oxycodone is the same as 14-hydroxydihydrocodeinone but is different from dihydrocodeinone. The difference is the 14-hydroxydihydrocodeinone, which means that on the 14th carbon there is a difference in the OH group, which is oxygen (130A-131A). It is also interesting to note whether the addition of oxygen can change the basic nature of the narcotic. There is also no evidence on this ussue. The chemist constantly

maintained that the only difference was this oxygen difference on the 14th member of the ring (132A), but he concludes that percodan only contains 4.50 milligrams of oxycodone (133A-134A).

During the prosecution's summation, when defense counsel objected, the Court lost its temper and told the attorneys to, "Shut up and sit down". Of course, motions for mistrial were denied I138A), but the Court apologized to the jury for losing its temper and told the jury that the attorneys had a perfect right to object. The jury was also told not to make any inference against the defense because of that incident. The Court then advised that the reason it lost its temper was because it demanded docorum in its courtroom (138A-139A). The attorneys argued that even the explanation was damaging because it implied to the jury that defense counsel had not been affording the Court decorum during the trial (141A). The Court then said it would take the two mistrial motions under advisement, but it was never decided (141A). CHIODA's attorney argued that when the Court cut him off, it also stopped him from making further objections to what he considered improper rebuttal on the part of the prosecutor (142A).

The Court charged the jury as a matter of law that percodan was a trade name for a Schedule II narcotic controlled substance, and that as a matter of law it came within that statute (143A-147A).

The jury came back and asked for the testimony of Detective WAINEN with regard to the December 10, 1976 meeting at Eastern Chemical long after the arrests had been made. The conversations were read back to the jury (148A-153A). Specifically the portion when CHIODA said that he remembered CICCONE being there once was related (150A-153A).

All of the petitioners were found not guilty as to every substantive count in this indictment, but they were convicted of the conspiracy count alone.

POINT I

THERE WAS NO PROOF BELOW TO INDICATE THAT PETITIONERS DEALT WITH A SCHEDULE II NARCOTIC. PERCODAN IS NOT A SCHEDULE II NARCOTIC AND THE INDICTMENT ON ITS FACE MUST BE DISMISSED. TO CLASSIFY IT UNDER SCHEDULE II VIOLATES DUE PROCESS.

The indictment below charged petitioners with conspiring to deal in and with dealing in a Schedule II Controlled narcotic,to wit: percodan. The jury acquitted all three men of the substantive counts, but convicted them of conspiracy. It was the government's contention

that percodan is synonymous with oxycodone, inasmuch as oxycodone is mentioned in Schedule II but percodan is not.

During the trial everyone agreed that the burden of proof of the government included proving that percodan was a Schedule II narcotic as an essential element of the indictment, a fact which required proof beyond a reasonable doubt (119A). If in fact the substance did not come within Schedule II or it was not synonumous with oxycodone, which is the designation in Schedule II, then all agreed that the indictment would have to be dismissed (119A-131A). The Court found as a matter of law that percodan was a Schedule II narcotic, and that issue was never submitted to the jury (121A,143A-147A). Although counsel apparently consented to that procedure, the question of whether counsel could so waive a jury trial on the issue is discussed in Point VI herein.

When one examines the schedule of controlled substances enumerated in Title 21 U.S.C. Section 1308, etc., one must conclude not only that percodan is not synonymous with oxycodone, but that the oxycodone possession in this case cannot come within Schedule II of that body of law. The schedules were set up and

the Drug Control Act was passed based upon certain criteria which divide prohibited substances according to the degree of potential for abuse, the currently accepted medical use of such substances, and absuses which may lead to psychological and physical dependency. In other words, the more dangerous a drug the lower its classification. In order to convict someone of conspiracy to deal or dealing in that drug or substance,it is necessary to show that the person dealt with a narcotic within the particular schedule charged and also that he knowingly conspired to deal in it or dealt with it knowing that the particular narcotic same within the particular schedule. This is discussed in greater detail elsewhere in this brief, but the point is that if a person is convicted of conspiring to deal in oxycodone, a Schedule II drug, that person must know that oxycodone is listed in Schedule II.

Schedule II contains the narcotic called oxycodone as the fifteenth item listed in subdivision (b)(1) of Section 1308.12, Schedule II. It does not and never has listed percodan as a controlled substance in any of the schedules listed in Title 21. The government, however, contended that possession of percodan was the same as possession of oxycodone because

percodan is merely a trade name for oxycodone. Nothing could be more inaccurate. The only evidence in this case came from the mouth of Mr. WEBER,the government chemist, and a reading of his testimony showed that he had no idea of the nature of oxycodone, percodan or any of the similar chemicals contained in Schedules II or III. However, one thing that was made clear was that percodan is a tablet produced by Endo Laboratories, Inc., which contains oxycodone in the form of 14-hydroxydihydrocodeinone. Each tablet contains a total of 4.88 mgs. of oxycodone component, but it also contains 224 mgs. of aspirin, 150 mgs. of phenacetin and 32 mgs. of caffeine. Thus, the total oxycodone compound represents 4.88 mgs. of a total of 420.88 mgs. The total percentage of oxycodone in the percodan tablet comes to approximately one percent. The literature published by Endo describing percodan as containing the above ingredients was discussed by the chemist at the trial and read into evidence. That literature alone, by its definition shows that percodan cannot be the same of oxycodone, since oxycodone is only a small component of the tablet percodan. There is no law or schedule which makes percodan, by name, illegal to possess. Nothing indicates that percodan

should be synonymous with oxycodone and certainly nothing in the statute takes that position. For the government to contend that percodan is the same as oxycodone, although percodan is not included in the statute, and then to contend that the defendants should have had knowledge of the fact, is straining reason. To come to that conclusion, two assumptions are necessary. It would be required to assume that the petitioners knew that percodan was the same as oxycodone and also that they should have or had known that oxycodone was included within Schedule II. These are both issues which were not proven or litigated at the trial, so that the conviction must fall based upon the failure to adduce any evidence of these issues. Furthermore, the indictment should be dismissed because it charges petitioners with dealing in percodan in violation of Schedule II rather than oxycodone.

One need only compare the different schedules to see that percodan or the possession of oxycodone within a percodan tablet is not prohibited under Schedule II. Schedule II talks about prohibiting, "...any of the following substances ..." Section 1308.12 Schedule II (b). It then lists seventeen items, all of which are basic substances found in their natural state. For

example, the Schedule lists opium, opium extracts, codeine, morphine and certain extracts. Oxycodone is also listed under number 15 as a basic chemical, and the only extract listed is Item 16, which is oxymorphone. If this Court examines Schedules III and IV, these schedules prohibit the possession of or dealing in "...any material, compound, mixture or preparation which contains any quantity of the following substances ..." Section 1308.13(b), Schedule III and Section 1308.14(b), Schedule IV. Schedule III also goes on to prohibit certain materials which contain more than a certain percentage of codeine or dihydrocodeinone, to which oxycodone is related. In other words, Schedules III and IV prohibit the possession of compounds in which certain percentages of prohibited narcotics are present. Schedule II prohibits possession of these narcotics in their pure form, because it is the only schedule that makes no mention of materials containing the prohibited narcotic or the percentage of the narcotic which falls within the schedule. Such is the case with Schedule I which is more like Schedule II, in that it deals with pure substances. It is clear by a simple comparison of the schedules that it was the intent of Congress, in Schedule II, to prohibit the

possession of oxycodone in its pure form and not to prohibit compounds containing a small percentage of of oxycodone, or Congress would have specified the same.

Oxycodone is a chemical produced by the reduction of hydroxycodeinone, and is not synonymous with percodan. In Europe, oxycodone is sometimes prescribed in its pure form, whereas in the United States it is usually only administered as it is contained in the percodan tablet. Thus, in an article written by S. Takki and T. Tammisto in "The Anaesthesist", Vol. 22, Issue 4, 1973, Pages 162-166, entitled, "A Comparison of Pethidine, Piritramide and Oxycodone in Patients with Pain Following Cholecystectomy", it can be seen that in a hospital in Finland tests were made concerning the relative effectiveness of the three different substances after certain surgery. Noteworthy in the article is the fact that oxycodone was administered, not in the percodan form, but in its original condition. That study conclusively shows that oxycodone has a significant medical value, and percodan to a lesser extent is used for other situations. In other words, the two are not the same. In the Physicians Desk Reference, 30th Edition, 1976, percodan is shown to

contain oxycodone, and the difference clearly shows that it is only one component in the tablet. The Reference says the "oxycodone component is 14-hydroxydihydrocodeinone, a white odorless crystalline powder which is derived from opium alkaloid, thebaine. In other works, such as K.W. Bentley, "The Chemistry of Morphine Alkaloids", Oxford 1954, Chapter 10, show the complicated relationships between oxycodone, hydroxycodeinone, dihydrocodeinone and codeine, and it shows how one is produced from the reduction of the other by virtue of a catalyst of a metallic nature, so that one substance is the salt of another.

In addition,another reason exists why percodan is not a Schedule II narcotic. Iy should be mentioned at this point that the classfications in subdivision (3) of Schedule III, specifically (4) in that subdivision, make it very clear that percodan is really a Schedule III narcotic. For example, in Item (4) it makes possession of more than 300 milligrams of dihydrocodeinone per 100 milliliters or more than 15 milligrams per dosage unit ofthat amount to be illegal, yet the dosage unit of percodan is only 4.88 milligrams. Thus, the prohibited combination in that Section is three and one-half times more powerful than

percodan, essentially the same chemical, yet it is classified as a less serious narcotic. This is true of all of the classifications under subdivision (e) in Schedule III.

Also, under Schedule II, subdivision (b)(2), any salt of any of the prohibited chemicals, such as opium, is also prohibited if it is chemically equivalent or identical to that substance. By virtue of that definition, any salt which is a derivative or salt, but is not chemically equivalent must be less dangerous and would come within the prohibitions of Schedule III rather than Schedule II. Schedule II initially lists prohibited substances, "Unless listed in another schedule ..." 1307.12 Schedule II(b). Therefore, if the oxycodone component in percodan is a salt of oxycodone, then it would fall within Schedule III. According to the Endo literature, the oxycodone component is 14-hydroxydihydrocodeinone. That substance, by definition, is a salt of oxycodone. It is listed as a salt under the definitions, under Title U.S.C., Food and Drugs, Section 329.1 and in the Bently book, "The Chemistry of Morphine Alkaloids", it is clearly described as a salt from being produced by the reduction

of dihydrocodeinone by the use of a metallic catalyst. Bentley, "The Chemistry of Morphine Alkaloids", supra, pages 168-176. The key to the true nature of the substance found in percodan is the word, "Hydroxy", which is defined in Webster's Third New International Dictionary as "containing hydroxyl esp. in place of hydrogen in the names of chemical compounds or radicals". Hydroxyl is "the univalent group or radical OH consisting of one atom of hydrogen and one atom of oxygen that is characteristic esp. of hydroxides, oxygen acids, alcohols, glycols, penos and hemiacetals. Also salts are derived from acids by replacement of part or all of the acid hydrogen by a metal or radical acting like a metal that may be formed by the reaction of acids with bases either with or without elimination of water with metallic oxide, or with metals and also in other ways." Webster's Third New International Dictionary, 1967, page 2005. A reading of the Merck Index, the Bentley book and the other medical data shows that while codeine is the original substance and related chemicals are created by reduction using a metallic catalyst which makes that chemical the salt of the chemical it is reduced from. In other words, 14-hydroxydihydrocodeinone is a salt of oxycodone. It is not identical to it and it

is really a Schedule III substance, similar to dihydrocodeinone described in that Schedule.

Of great significance is the fact that these matters were not even inquired into in the Court below. No evidence was presented to show what the nature of percodan was or its relationship to oxycodone or how it was created and its specific nature and characteristics. The chemist who testified was particularly incompetent and had no knowledge of any of the issues involved. He was so confusing that he contradicted himself continuously and at one point he testified that all of the different chemicals were synonymous, and then he testified that they were different. He concluded that the oxycodone component was only 4.50 mg. which would make it less than the prohibited amount described in Schedule III(3)(1)-8. It should also be pointed out that in Item 8 in subdivision (e) of Schedule III, the substance, morphine, in its pure form, is discussed where the possession is 500 milligrams per 100 milliliters.Here,too, that substance is more dangerous and powerful than the percodan in the instant case. The witness continuously said that he did not know what the difference between the various substances was, but he did acknowledge that the perco-

dan component substantially differed from oxycodone in its pure form (105A). He continuously said that he was not sure about anything and then, when he came back the second day, he still relied upon the Merck Index, but again exhibited no comprehensive knowledge regarding anything of substance to do with the substances in the case. The Court generally accepted his conclusions without thought and completely foreclosed that issue from the litigation or from consideration by the jury. If the factors we have just described were explored and explained, the jury could have very well found, as a matter of fact, that percodan is not synonymous with oxycodone, and that it is not a Schedule II narcotic. The jury was charged as a matter of law that percodan was a Schedule II narcotic, and this essential element was taken out of the case. Certainly,the government's failure to sustain its burden in this regard in this case must be reviewed. In the only reported case involving percodan, Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), the question involved was whether percodan tablets were a narcotic drug. The statute at the time of that prosecution made no differential between percentages of a compound containing narcotics, but the only issue was whether percodan contained

codeine and whether, because of that, it was a narcotic. There were no schedules set up at the time and no finding regarding the true nature of percodan was made, except that it was found that percodan was a derivative of a narcotic drug only because it contained 1% of dihydrocodeine. It is submitted that had the prohibition in the statute been against oxycodone, rather than merely finding percodan to be a narcotic, that that prosecution also would have had to fall.

No one in this case seemed to really know anything about the true nature of percodan. The prosecutor admitted that he did not do his homework (119A), and the Court just went along with the prosecutor's contentions without any kind of inquiry. The chemist, of course, was totally confused, and it seems that this case should not have been allowed to conclude without proper inquiries into the whole narcotic question.

POINT II

NO PROOF WAS PRESENTED TO SHOW THAT THE PETITIONERS KNEW THAT THE SUBSTANCE THEY DEALT WITH, PERCODAN,WAS A SCHEDULE II CONTROLLED SUBSTANCE. TO CONVICT THEM WITHOUT ANY PROOF AT ALL VIOLATES DUE PROCESS.

Petitioners contended that the percodan tablets that they dealt with were not a Schedule II substance,

and so the indictment must be dismissed as a matter of law. However, regardless of whether it is a Schedule II or Schedule III narcotic, the law is clear that in order for a prosecution like this to be sustained, there must be proof that the petitioners knew what they were dealing with and knew that the specific substance was specifically prohibited in the correct schedule. In United States v. Goldman, 450 F.2d 873, (1971 1st Circuit),the jury was told that even if salt of morphine was a narcotic drug, as a matter of law, the prosecution would have to prove that the defendant knew he was selling a narcotic drug. In other words, if he knew that the subject of the sale was morphine, but didn't know that morphine was a narcotic, the prosecution would fall. There is, of course, no evidence in the instant case that even if the petitioners knew they were dealing in percodan that they knew percodan was a narcotic or that it was a Schedule II substance. It is true that studied ignorance of a fact may constitute an awareness of so high a probability of the fact that an inference of knowledge would be justified, still in the absence of such an extraordinary situation, knowledge must be actually proven. For example, in a cocaine smuggling case where the cocaine

was contained in a man's belt and he took furtive actions when he came into the airport, circumstances made it plain that he had knowledge. Still, true ignorance in a case with less suspicious circumstances would be an actual defense. United States v. Joly, 493 F.2d 672 (1972 2nd Cir.); United States v. Jones, 486 F.2d 476 (1973 8th Cir.); Leary v. United States, 395 U.S. 6 (1969); Turner v. United States, 396 U.S. 398 (1970); United States v. Moser, 509 F.2d 1089 (1975 7th Cir.). Where a person selling a substance which he thought to be heroin but which was really an uncontrolled substance, the sale did not constitute a criminal act. The actual knowledge of the true nature of the substance and the manner in which it is prohibited is essential. United States v. Oviedo, 525 F.2d 881 (1976 1st Cir.). Ignorance may be no excuse, but where an uncontrived lack of knowledge deprives someone of the specific intent necessary to commit the crime, it is a complete defense. United States v. Squires, 440 F.2d 859 (1971 2nd Cir.).

In the case at bar there is absolutely not one scintilla of evidence to show that the petitioners knew that the percodan they were dealing with was a Schedule II prohibited substance. In fact, there was

not even any evidence of any value to show that they even knew they were dealing with percodan or knew that it was prohibited generally. PALUMBO and CHIODA had a substantial industrial chemical business, and it seems outlandish for them to have risked everything in exchange for the relatively small amount of money that they would have made from the sale of percodan. In addition, these were men who were experienced with chemicals, yet they made no attempt to remove the markings or labels from the bottles of percodan. CRITELLI, the real infamous character in this whole scenario, was extremely concerned with taking the labels off when he sold them to the undercover police officer. Here was a man who was experienced in these matters and who knew full well that he could be arrested in the event these pills were ever seized. He certainly had the knowledge that what he was dealing with was illegal, but the very fact that petitioners did not seek to protect themselves against this eventuality shows that they were ignorant of the nature of percodan. After all, nothing could have been easier than for petitioners to remove the labels from the bottles. In addition, CRITELLI admitted that in all of the telephone conversations he specifically had

with the petitioners the word, percodan, was never used in any of the telephone calls (72A, 76A). The profit to petitioners was minimal and the real money would have been made only by the people who were reselling the pills (6.97,78A). Even after the case ended and after the arrests were made, the conversation with CRITELLI in the presence of the undercover police officer did not put additional knowledge in the minds of the petitioners. SHINE and PALUMBO were not present, so that a Bruton situation developed as to them. However, the conversation itself in no way indicated that CHIODA knew that percodan was involved in the cartons that supposedly were previously delivered or that percodan was a narcotic and prohibited under Schedule II. CHIODA only assumed that something had been picked up by ANTHONY (71A). The way the conversation came about, it was really a response to a question, and depending upon the tone of the response, the statement, which was ambiguous, could have meant just about anything. The point is, the undercover police officer never heard of the petitioners, and the CICCONE's had nothing new to offer in the way of proof which would indicate that they had dealt with percodan knowing what it was. The evidence as to SHINE is even more

tenuous. The only testimony against SHINE was that he put a wrapped carton in CRITELLI's car. SHINE was not present at any of the meetings and the only reference to SHINE made by one of the petitioners was that, "Monk finally did something right", and is completely absurd as evidence tending to give SHINE knowledge of what was going on.

It is most respectfully suggested that no evidence in this case exists whatsoever, even out of CRITELLI's month, that indicates that the petitioners knew percodan was a Schedule II narcotic. There is also no evidence to indicate that the petitioners knew that percodan was prohibited even in general. The absence of any evidence at all on the issue deprived petitioners of a fair trial within the concept of due process. The result here, in effect, was a conviction without any basis.

POINT III

THERE IS NO PROOF THAT THE PETITIONERS ADOPTED, JOINED OR EVEN KNEW ABOUT THE CONSPIRACY CHARGED IN THE INDICTMENT. THERE WAS ALSO NO INDEPENDENT EVIDENCE LINKING PETITIONERS WITH THIS CONSPIRACY OTHER THAN THE STATEMENT OF A CO-CONSPIRATOR.

The Courts have consistently and traditionally held that for one to be acceptable as a conspirator,

he must associate himself with that conspiracy and in some manner promote the venture of have a stake in its outcome. Direct Sales Company v. United States, 319 U.S. 703 (1943); United States v. Falcone, 108 F.2d 579 (2nd Cir.), aff. 311 U.S. 205 (1940). It has been accepted that knowledge of the agreement to violate the law must be attributable to the defendant, and that knowledge must be based upon serious inference or proof other than the declarations of a co-conspirator. Cinquegrano v. United States, 379 U.S. 960 (1964); Evola v. United States, 362 U.S. 974 (1960).

It has also been held, and the law is almost universal, that mere participation in a single, isolated transaction is an insufficient basis upon which to base an inference of a continued participation in a conspiracy or that a person adopted its purpose and ends. United States v. Santore, 290 F.2d 51 (2nd Cir.), cert. den. sub nom, D'Aria v. United States, 365 U.S. 834 (1966); United States v. Denoia, 451 F.2d 979 (2nd Cir. 1971); United States v. Morado, 454 F.2d 167 (5th Cir.) cert. den. 406 U.S. 917 (1972).

The Courts have also been almost unanimous in holding that in order to establish a defendant's participation in a conspiracy, that the evidence must

come from independent sources other than testimony of a co-conspirator. It is only once a defendant's involvement is independently established that the acts and conversations of a co-conspirator can be charged to a defendant. In United States v. Rodriques, 491 F.2d 663 (3rd Cir. 1974), even though the District Court initially admitted the statement of a co-conspirator into evidence, there still had to be independent evidence linking the declarant to the defendant. Once the independent basis for the evidence exists, it would be up to the jury to determine how much weight it should merit, but unless some independent proof of participation in a conspiracy could be shown, the evidence could not even come into the trial. The Rodriques case was reaffirmed in United States v. Trowery, 542 F.2d 623 (3rd Cir. 1976), and adhered to the rule that before co-conspirator evidence could be admitted at a trial, the Court would have to determine that an independent basis for involvement in the conspiracy existed. If this were not true, then hearsay evidence of this sort would be lifted by its own boot straps to the level of competent evidence. This theory is not new, since this Court recognized it in Glasser v. United

States, 315 U.S. 60 (1942), and a description and explanation of the particular, specific nature of the rule is given by the Third Circuit in Trowery at page 627. The Court said:

> "Since the quantum and nature of evidence required for the application of the co-conspirator exception differ from that required for conviction of the crime of conspiracy, '(t)he trial judge's finding on admissibility in no way restricts the the jury's inquiry into guilt or innocence,' when the crime of conspiracy is charged in the indictment, Carbo v. United States, 314 F.2d at 737"

United States v. Trowery, supra, at 627.

The Third Circuit's holding in Rodriques was also cited in United States v. Herrera, 407 F.Supp. 766, 773 (U.S.D.C.N.D. Ill. 1975), wherein the independent evidence rule was recognized, and it was also followed in United States v. Wolk, 398 F.Supp. 405 (U.S.D.C.E.D. Pa. 1975).

Almost every other jurisdiction has adopted the same rule requiring independent proof of a co-conspirator's involvement in a conspiracy before the acts or declarations of his so-called associate may be used against him. Taylor v. United States, 260 F.2d 737 (D.C. Cir. 1959); Williams v. United States, 289 F.2d 598 (9th Cir. 1961); Glover v. United States, 306 F.2d

594 (10th Cir. 1962); Montford v. United States, 200 F.2d 759 (5th Cir. 1953); National Dairy Products Corp. v. United States, 350 F.2d 321 (8th Cir. 1965); United States v. Santos, 385 F.2d 43 (7th Cir. 1967); United States v. McGowan, 423 F.2d 413 (4th Cir. 1970).

When one examines the evidence in the trial at bar, the conclusion must be reached that not one single iota of evidence existed other than the testimony of one co-conspirator, CRITELLI, that petitioners participated in the conspiracy. Here, too, the conviction of petitioners without any basis in fact at all deprives them of due process.

There is no evidence other than CRITELLI's testimony that the petitioners ever adopted the ends of the conspiracy, participated in the conspiracy, or that their involvement, if at all, was anything more than an isolated sale of some cartons of percodan. This case falls within the general rule that single acts are insufficient and mere association with an alleged co-conspirator without knowledge is insufficient to establish participation in a conspiracy. United States v. Stromberg, 358 F.2d 267 (2nd Cir.) cert. den. sub nom Lessa v. United States, 361 U.S. 863 (1959); United States v. Morado, supra; United States v. Falcone, supra.

In the Falcone case, a defendant sold material for making beer to members of a distilling ring with knowledge that the material would be used for an illegal purpose. Still, this Court held that a mere purchase or sale did not establish knowledgeable entry into an illegal venture, since the sale did not confirm the defendant's essential stake in the outcome of the conspiracy. In addition, knowing that the material would be used for an illegal purpose did not establish, in and of itself, that the defendant knew of the conspiracy or knowingly associated himself with it. The same result was reached in United States v. Peoni, 100 F.2d 401 (2nd Cir. 1938), wherein Peoni sold counterfeit bills to someone who,in turn, resold them to another person, each knowing that the bills were counterfeit. The Court said that the transactions were isolated purchases and sales and, therefore, insufficient to link the defendant to a common criminal activity. The same is true where sales of drugs or narcotics are made without specific involvement of the seller in the conspiracy to subsequently distribute.Although the Second Circuit found that the evidence of knowledge is clear in one case, it said although there:

"may be circumstances in which the evidence

of knowledge is clear, yet the further step of finding the required intent cannot be taken. Concedely, not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy.

Emphasis added. Direct Sales Company v. United States, supra at 712.

This case is peculiar. The jury acquitted all three petitioners of all of the possession and sale charges involving the percodan. Had that not happened, it could have been argued that the proof of the sale alone does not necessarily mean that the petitioners participated in an over-all conspiracy to distribute percodan. The government's position in this case must be considered to be weaker than in the normal case, because they cannot even argue that there was a sale in this case, since the jury's conclusion must be binding in that regard. The jury's conclusion must also undermine the credibility of CRITELLI, a co-conspirator, and the only government witness who gave evidence that petitioners were involved in a conspiracy. Obviously, the jury did not believe CRITELLI, otherwise they would convicted petitioners of a sale.

The other members of this alleged conspiracy, the CICCONE brothers, never testified that petitioners knew

who they were or what they had intended to do with the percodan, and the undercover agent to whom the narcotics were resold, Officer WAINEN, never even heard of petitioners until after the arrests were made (91A, 92A-94A).

The only other evidence in this case that involved petitioners and did not come from the mouth of CRITELLI, was the incident that occurred at Eastern Chemical more than a month after the arrests. It is most respectfully suggested that that has no probative value with respect to establishing petitioners' participation in the conspiracy. There was no conversation of value, and the undercover officer only heard petitioner, CHIODA, acknowledge that CICCONE had picked up something on one occasion. It is submitted that that testimony was so ambiguous that it established absolutely nothing. The most that could be said about it, even if one assumes that it was incriminating or relevant, is that it established that CICCONE picked up something. Even at that, the conversation did not describe what it was that was picked up, and it really could have related to anything. It also was obviously an attempt by CHIODA, without thinking, to merely acknowledge or agree to whatever was said at the time, which is something that

most people do quite often. We are very familiar with situations where discussions are had, and rather than prolong the conversation on a particular detail, a person may make a statement such as, "Okay, you are right". We are all familiar with similar statements which are made in haste, but which really do not prove anything. This statement allegedly made by CHIODA, even if it was well thought out and not a hasty response to a statement made to entrap him,would not infer that the petitioners participated in any scheme or conspiracy. In addition, neither PALUMBO or SHINE were present, so that the statement could not be attributed to them. In any event, it could also not be used against PALUMBO or SHINE to establish participation in the conspiracy, because if that is the independent evidence sought to show participation, to use it against the two petitioners who were not present, would be, in effect, using the declaration of a co-conspirator. This would obviously beg the question, and would have the effect of lifting the prohibited hearsay by its own boot straps.

The sum total of evidence in this case consisted basically of the testimony of CRITELLI, who was the only one who implicated the petitioners of doing any-

thing. This testimony, it is contended, was insufficient to establish the participation of the petitioners in the conspiracy, as a matter of law, and it was testimony of the very worst sort. This is true because of the type of individual CRITELLI was, his great motive to lie, and the fact that the jury apparently thought he lied, since they acquitted the petitioners of four of the five counts. It is difficult to say how, by any stretch of the imagination, the government could show that this was sufficient evidence, not only to convict but to establish the fact that the petitioners joined the conspiracy and adopted its ends as their own.

It is also claimed that all of the evidence, regardless of from where it came, was insufficient as a matter of law to sustain this conviction. This is particularly true of SHINE, who was never present at any of the conversations when percodan was discussed.

POINT IV

THE POST-ARREST CONVERSATION IN WHICH PETITIONER, CHIODA, PARTICIPATED COULD NOT BE USED AGAINST THE OTHER PETITIONERS. TO DO SO VIOLATED BRUTON AND PETITIONERS' RIGHTS OF CROSS EXAMINATION.

We referred to a conversation which occurred

about a month after petitioners were arrested and argued that it was not indicative of participation in any conspiracy. In addition, we suggested that the use of that conversation violated petitioners' rights under the Sixth Amendmant, as decided in Bruton v. United States, 391 U.S. 123 (1968). It was clearly established in that case that a co-defendant's out-of-court confession implicating another defendant could not be admitted even though clear instructions regarding its use were given to the jury. Everyone is familiar with the Bruton case, and probably every lawyer who practices criminal law knows of the rule enunciated in that decision. However, sometimes the reason for the rule and the theory of the decision are forgotten. The right that is involved is the right of cross examination which is included in the right of an accused in a criminal case to confront the witnesses against him. The reason for the decision had nothing to do with voluntariness or coercion. This is important because it indicates the basis given by the Court in this case for overruling petitioners' Bruton objection. After prolonged argument on the whole question of Bruton and the admissibility of the December 10, 1976 conversation, the Court

held that it was admissible because Bruton was not involved, since CHIODA had not been in custody (63A-64A). Custody has nothing to do with a person's right to cross examine and to confront witnesses. Custody has traditionally only been relevant regarding the question of voluntariness and coercion. In the leading case of Jackson v. Denno, 378 U.S. 368,(1964), much was said about coercion, police dominated atmosphere and other factors which are to be considered on the question of voluntariness. Many courts have since recognized that coercion and voluntariness had a direct relationship to truth, and so these matters became important. However, in the Bruton situation, voluntariness has nothing to do with the situation. Along these lines, where a person is in custody, since it is his right to cross examine and confront witnesses that is involved in that regard, whether a statement is taken or a confession or admission is given, is similarly unimportant; since it is the inability to cross examine a statement made at a different time and a different place which is involved. The inability to cross examine and the inability to confront witnesses are reasons for Bruton and all of the cases following it. Nelson v. O'Neil, 402 U.S. 622 (1971); Schneble v. Florida, 405 U.S. 427

(1972); United States v. Yates, 524 F.2d 1282 (D.C. Cir. 1975); Calloway v. United States, 399 F.2d 1006, cert. den. 393 U.S. 987 (D.C. CIr. 1968); Park v. Huff, 493 F.2d 923, reh. 506 F.2d 849 (5th Cir. 1974); United States v. Addonizio, 451 F.2d 49, cert. den. 405 U.S. 936, reh. den. 405 U.S. 1948 (3rd Cir. 1971).

Even if the admission or statement is admissible under the co-conspirator exception to the hearsay rule, that does not mean that the confrontation clause of the Constitution is complied with. United States v. Snow, 521 F.2d 730, cert. den. 423 U.S. 1090 (9th Cir. 1975). The Snow case is interesting, because that involved a situation where there was no custodial detention, but an out-of-court statement was made to an undercover officer, just like in the case at bar. That made no difference because the right of confrontation and the right to cross examine had nothing to do with whether the person was in custody. The opinion cited in United States v. Baxter, 492 F.2d 150, 177 (9th Cir. 1973), cert. den. 415 U.S. 940, and other cases wherein factors relative to reliability were considered. It was held that a court should determine whether the statement was admissible based upon the examination of certain things, such as the circumstances under which the

statement was made, whether the statement contained an assertion of a past fact, whether the declarant had personal knowledge of the identity and role of the participants in the crime, and other circumstances which would be significant.

It is most respectfully submitted that the Court's permitting the statement of CHIODA to come in to this case was wrong, not only for the reasons set forth in Point II herein, but also because it violated the right of the other petitioners under the confrontation clause.

POINT V

THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED BY THE COURT AND ITS ATTITUDE TOWARD THE PETITIONERS DEPRIVED THEM OF A FAIR TRIAL.

Petitioners recognize that an antagonistic attitude toward a defendant at a criminal trial or errors committed by a Court are, to a great extent, subjective. In other words, no hard and fast rule can really be drawn with obvious exceptions as to each particular error or each particular mode of conduct on the part of a Court necessitating the reversal of a conviction. These decisions can best be made on a case by case basis when one appreciates particular errors complained of relative to the particular facts

in each proceeding. It is also recognized that where there is more doubt as to the guilt of a defendant, the effect of the errors, misconduct or the cumulative effect of the repeated improprietites, have more of an impact.

This case was a close case. One need only point again to the fact that the jury acquitted all of the petitioners of four of the five counts of this indictment and that the only remaining count was based entirely on the testimony of a not very upstanding co-conspirator to illustrate this point.

With this in mind, it is most respectfully suggested that no one can ever say with assurance that the Court's outburst did not effect the jury's deliberations.

The United States Attorney was giving his rebuttal, and when that rebuttal is read it can be appreciated that the prosecutor really went far beyond the purpose of rebuttal. When the defense properly objected that the prosecutor was testifying as an expert (136A), the Court lost its temper and admonished the defense attorneys. The Court said that their time talk was over, they should sit down and remain silent (136A). When objections were then made during the point where

the prosecutor discussed the testimony of the security guard for Endo Laboratores, an item which is discussed hereafter, the Court became abusive. The Court told counsel to, "Shut up and sit down". The Court continued, "Yes, please sit down. I've had enough over there" (137A). Motions for mistrial were denied (138A), and then the Court apologized to the jury for its actions. The Court told the jury that it did something no Judge was supposed to do -- it lost its temper. The Court also told the jury the defense had a perfect right to object, and that if the Court didn't agree with the objection, it could have calmly overruled it. The Court continued that it was wrong, and that the jury was to make no inferences against the petitioners (138A-139A). If that had been the end of the matter, it would have been bad enough, but the Court continued by telling the jury that the reason for it losing its temper was because, "...I demand decorum in my courtroom. That is why I did it" (139A). Counsel properly pointed out that the explanation did more damage than the outburst because it implied to the jury that decorum was not, "... being afforded the court from this table" (140A-141A). In addition, counsel pointed out that the particular objection that the Court responded

to was a proper objection. The Court again admitted that it had been wrong, and the lawyers pointed out for the second time that the explanation implied that decorum was lacking, a fact which actually was not true (141A). Another mistrial motion was made, and although decision was reserved, apparently the Court never rendered a decision (141A). Counsel for CHIODA also added that after the Court lost its temper, he was prevented from making further objections which he considered proper, because he didn't want to antagonize the Court further (142A).

In a case this close, anything that a Court may do which might indicate to the jury that the Court had an opinion of the case could deprive a defendant of a fair trial. When the Court said that it had enough of defense counsel, the implication was clear that what defense counsel had to say was unimportant and should be disregarded. There can be no question that this may have had a substantial effect on the deliberations of the jury, and we can never be sure that it did not constitute the last straw which caused the jury to convict petitioners of one count while acquitting them of the other four.

The attitude of the Court was apparent. Petitioners

had been at liberty on bail during the entire trial. Petitioners, PALUMBO and CHIODA,were partners in a substantial industrial chemical company, yet as soon as the verdict was announced they were remanded without their attorneys having an opportunity to say a word. Obviously, there had been prior communication between the Court and the United States Attorney or someone on behalf of the prosecution. Obviously, the Court had been told that during the December 10th conversation, when the undercover police officer was present, that the petitioners were planning to do harm to CRITELLI, the main government witness. The Court simply said, "In the meantime because of the severity of the offense, the criminal records - past criminal records of the defendants - and the atmosphere ofthe case in which one witness, it was necessary to place him in the Marshal's protective plan, defendants' bail is vacated. Defendants will re remanded in the custody of the United States Marshal pending sentence" (154A-155A). The incident happened so quickly that no one got a chance to say anything, but it was explored further on sentence and on motions regarding bail to the District Court and to the Circuit Court. It was suggested that at the December 10th meeting, while the undercover officer, WAINEN,

was present, and at which time CHIODA made this supposed damaging admission, a black customer of the petitioners came to the premises looking for something to stop up a plumbing drain. CRITELLI later complained that the black man, JACOB PULLEN,looked at him so that he felt threatened, although nothing was said. Based upon this, which was somehow communicated to the Court, petitioners were all remanded and bail was denied by the Trial Court. That argument was also made by the government in opposing bail in the Circuit Court. At no time were the petitioners ever given a hearing or was the witness, PULLEN, asked to give testimony, although he submitted an affidavit to the Circuit Court on the application so, in effect,the contentions of the government were total nonsense.

The prosecutor said that he thought that the petitioners were going to kill CRITELLI on December 10th (156A)*, but nothing in the way of evidence or testimony was ever submitted at any time to support this contention. It is believed that this event, unproven, was the sole basis for the severity of the sentences imposed, which is discussed hereafter, but it also serves to illustrate the Court's attitude in this case.

*Reference is to sentence minutes.

It is most respectfully submitted that the cumulative effect of all of these occurrences plus the obvious hostile attitude of the Court deprived the petitioners of a fair trial.

The Court allowed testimony of a conversation in which CHIODA apparently said that MONK, meaning petitioner, SHINE, finally did something right (49A). Since SHINE was not present, this was in violation of the Bruton rule and should have been excluded. The United States Attorney was permitted to voice his own opinion, on summation, as to the credibility of his witness (8.56) and his rebuttal went far beyond the purposes of rebuttal. There were strong objections constantly made to the prosecution going into new matters not discussed in the defense summation. The prosecutor's rebuttal was just like another summation, all over again (8.124-138).

The Court, in keeping with its hostile attitude towards the defense, overlooked the government's violation of its own discovery order as well as other principles of law which required the prosecution to turn over statements and other information to the defense (4.115-117, 125-126).

Testimony of the only major witness, CRITELLI,

was obviously carefully rehearsed due to his total reliance on the telephone records and his inability to recall any other telephone calls reflected in those records that he had not rehearsed himself to relate. It cannot be said after considering all of the errors committed that peitioners received a fair trial.

POINT VI

THE ATTORNEYS BELOW HAD NO POWER TO WAIVE PETITIONERS' RIGHTS TO A TRIAL BY JURY ON THE ISSUE OF WHETHER PERCODAN WAS A SCHEDULE II OR III SUBSTANCE.

During the argument of the case in the Court of Appeals, it was pointed out that the review capabilities of the Court were somewhat limited because all of the attorneys had consented to the Trial Court deciding the issue of what percodan was. When the prosecution first suggested that it was the province of the Court to decide the issue, a position that the Court shared, counsel agreed and the procedure of having the Court rule on the issue was acquiesced in. The petitioners did not affirmatively waive their right to have that issue decided by a jury.

This Court, of course, is well aware of its decision in Johnson v. Zerbst, 304 U.S. 458, and all

of the decisions which came thereafter, establishing the fact that waiver of a substantial or constitutional right must be affirmatively made with intelligence and after consultation with counsel. Much was made during the argument in the Court of Appeals that petitioners' attorneys had consented to allow the Court to decide the issue of the schedule under which percodan should be placed, rather than having it submitted to the jury. We submit that the consent, in effect, operated to waive petitioners' right to a jury trial on that issue, which was one of the essential elements to be proven by the government. Such waiver was not effected after consultation with petitioners, nor were petitioners asked by the Court whether they concurred in the conduct of their attorneys or whether they affirmatively realized that they were waiving their right to have an essential element go before the jury. Of course, we argued that even if such waiver was operative, the Court's decision was so wrong, as a matter of law, that petitioners' constitutional rights were violated. The waiver would not mean that any decision by the Court would be binding and not subject to review. It is suggested that if the instant petition is granted, the

question that will be presented to this Court is just how far an attorney can go in waiving his client's right to have an essential element tried to the jury without the affirmative consent of the client.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1890, 77-1891, 77-1892

UNITED STATES OF AMERICA

vs.

PALUMBO, Nicholas,

Appellant, No. 77-1890
(D.C. Crim. No. 77-20-1)

UNITED STATES OF AMERICA

vs.

CHIODA, Frank,

Appellant, No. 77-1891
(D.C. Crim. No. 77-20-2)

UNITED STATES OF AMERICA

vs.

SHINE, Eugene,

Appellant, No.77-1892
(D.C. Crim. No. 77-20-6)

Appeal from the United States District
Court for the District of New Jersey

Argued
January 9, 1978

Before: ALDISERT and HUNTER, Circuit Judges, and
HUYETT, District Judge.*

*Honorable Daniel H. Huyett, 3rd, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation

JUDGMENT ORDER

After considering the contentions raised by appellants, to-wit, that (1) there is no proof below to indicate that appellants dealt with a Schedule II narcotic and that percodan is not a Schedule II narcotic and that the indictment on its face must be dismissed; (2) no proof was presented to show that the appellants knew the substance they dealt with, percodan, was a Schedule II controlled substance; (3) there was no proof that the appellants adopted,joined, or even knew about the conspiracy charged in the indictment. and there was no independent evidence linking appellants with the conspiracy other than the statement of a co-conspirator; (4) the post-arrest conversation in which appellant, Chioda, participated could not be used against the other appellants; and (5) the cumulative effect of the errors committed by the court and its attitude toward appellants deprived them of a fair trial; and (6) the sentences imposed upon the

appellants were excessive; it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT

R.J. Aldisert

_____

Circuit Judge

Attest:

Thomas F. Quinn

_____

Thomas F. Quinn, Clerk

DATED: January 9, 1978